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**Eric Gonzalez**  
District Attorney

**ADA AISHWARYA SHESH**  
Assistant District Attorney

JUNE 29, 2021

In connection with the above-named case, the People voluntarily provide the following information regarding:

**MOS NAME: MARTIN, DAMON**

**MOS TAX: 920558**

in satisfaction (to the extent applicable) of their constitutional, statutory, and ethical obligations. In addition to any information provided below, disciplinary information regarding this officer may exist online at the following websites: <https://www1.nyc.gov/site/ccrb/policy/MOS-records.page>, <https://nypdonline.org/link/13>, and <https://www.50-a.org>. The People make no representation regarding the accuracy of any information contained on these websites. In addition, the People have provided all lawsuits known to the People through NYPD documents, the NYC Law Department's public website of civil suits filed against officers (<https://www1.nyc.gov/site/law/public-resources/nyc-administrative-code-7-114.page>), and orally relayed to the People by officers. Please note that additional cases may or may not exist on the following public websites: <https://pacer.uscourts.gov/> <https://iapps.courts.state.ny.us/webcivil/FCASMain>; and <https://iapps.courts.state.ny.us/nyscef/Login>. The People reserve the right to object to the use or introduction of any or all disclosures provided below and any other potential impeachment information.

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**Disclosure # 1:**

MOS MARTIN PLED GUILTY TO THE FOLLOWING DEPARTMENTAL DISCIPLINARY CHARGES:

1. MOS MARTIN, ASSIGNED TO THE 67TH PRECINCT, WHILE ON DUTY ON SEPTEMBER 3, 2004, AT A LOCATION KNOWN TO THIS DEPARTMENT, KINGS COUNTY, DID WRONGFULLY ENGAGE IN CONDUCT PREJUDICIAL TO THE GOOD ORDER, EFFICIENCY AND DISCIPLINE OF THE DEPARTMENT, TO WIT: MOS MARTIN FAILED TO SAFEGUARD A PRISONER KNOWN TO THIS DEPARTMENT, RESULTING IN THE LOSS OF SAID PRISONER.
2. MOS MARTIN ASSIGNED AS INDICATED IN SPEC.#1, WHILE ON DUTY, AT THE TIME, DATE AND PLACE INDICATED IN SPEC.#1, AFTER LOSING SAID PRISONER DID FAIL TO REPORT IMMEDIATELY TO THE PATROL SUPERVISOR AND THE PLATOON COMMANDER ANY UNUSUAL CRIME, OCCURRENCE OR CONDITION, AS REQUIRED.  
PENALTY: THIRTY-TWO (32) DAYS SUSPENSION.

**Disclosure # 2:**

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATION, DATED 01-07-10, AGAINST MOS MARTIN:

ALLEGATION: MEMOBOOK-INCOMPLETE  
ACTION TAKEN: LETTER OF INSTRUCTION  
CLOSED: 7/30/11

**Disclosure # 3:**

MOS MARTIN WAS FOUND GUILTY AFTER DEPARTMENTAL TRIAL OF THE FOLLOWING ALLEGATIONS ARISING FROM AN INCIDENT OCCURRING IN THE KINGS COUNTY ON 10/4/08, ARISING FROM A CCRB INVESTIGATION:

1. DID ENGAGE IN CONDUCT PREJUDICIAL TO THE GOOD ORDER, EFFICIENCY AND DISCIPLINE OF THE NEW YORK CITY POLICE DEPARTMENT IN THAT SAID SERGEANT DID ABUSE HIS AUTHORITY AS A MEMBER OF THE NEW YORK CITY POLICE DEPARTMENT BY AUTHORIZING A POLICE OFFICER TO ISSUE A SUMMONS TO A PERSON KNOWN TO THE DEPARTMENT WITHOUT SUFFICIENT LEGAL BASIS FOR SAID SUMMONS.

2. DID ABUSE HIS AUTHORITY AS A MEMBER OF THE NEW YORK CITY POLICE DEPARTMENT IN THAT SAID SERGEANT CONDUCTED A STRIP SEARCH OF A PERSON KNOWN TO THE DEPARTMENT, BUT SAID SERGEANT FAILED FOLLOW PROPER STRIP SEARCH PROCEDURES: TO WIT, RESPONDENT DID NOT RECEIVE AUTHORIZATION FROM THE DESK OFFICER TO CONDUCT SAID STRIP SEARCH, AND RESPONDENT DID NOT NOTIFY THE DESK OFFICER THAT SAID STRIP SEARCH WAS BEING CONDUCTED.

3. MADE INSUFFICIENT NOTATIONS IN HIS ACTIVITY LOG FOR HIS TOUR ON THAT DATE.

4. DID ENGAGE IN CONDUCT PREJUDICIAL TO THE GOOD ORDER, EFFICIENCY AND DISCIPLINE OF THE DEPT, IN THAT SAID SERGEANT DID ABUSE HIS AUTHORITY AS A MEMBER OF THE NYPD BY TRANSPORTING SAID PERSON KNOWN TO THE DEPARTMENT TO THE 73RD PRECINCT STATIONHOUSE, WITHOUT POLICE NECESSITY.

PENALTY: FORFEITURE OF 15 VACATION DAYS.

SEE ATTACHED CCRB CLOSING REPORT.

**Disclosure # 4:**

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATION, DATED 01-20-11, AGAINST MOS MARTIN:

ALLEGATION: MEMOBOOK INCOMPLETE

ACTION TAKEN: 'B' CD ISSUED

CLOSED: 10/24/11

**Disclosure # 5:**

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATION, DATED 12-6-13, AGAINST MOS MARTIN:

ALLEGATION: OTHER DEPARTMENT RULES (FAILURE TO MAKE PROPER NOTIFICATIONS ON THE SALE OF HIS FIREARM

ACTION TAKEN: A CD ISSUED

CASE CLOSED: 06/24/14

**Disclosure # 6:**

THE NYPD ENTERED A DISPOSITION OF MINOR PROCEDURAL VIOLATION, ARISING FROM 6-8-17, AGAINST MOS MARTIN FOR THE FOLLOWING ALLEGATIONS:

OTHER DEPT RULES/PROCEDURES VIOLATION -MINOR PROCEDURAL VIOLATION

MEMOBOOK INCOMPLETE/IMPROPER -MINOR PROCEDURAL VIOLATION

CLOSED: 5/29/18

**Disclosure # 7:**

THE NYPD ENTERED A DISPOSITION OF MINOR PROCEDURAL VIOLATION, ARISING FROM 5-17-16, AGAINST MOS MARTIN FOR THE FOLLOWING ALLEGATIONS:

MEMOBOOK INCOMPLETE/IMPROPER - MPV

CASE CLOSED: 08/07/17

**Disclosure # 8:**

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATIONS, DATED 9-11-18, AGAINST MOS MARTIN:

ALLEGATION : 1. INVOICE DISCREPANCY - LAB - CONTROLLED SUBSTANCE

CLOSED DATE : 2018-11-09

ACTION TAKEN : VERBAL OF INSTRUCTIONS

**Disclosure # 9 :**

MOS MARTIN PLEAD GUILTY TO THE FOLLOWING NYPD DEPARTMENTAL CHARGES AND SPECIFICATIONS, ARISING FROM CCRB CASE 201804938:

1. SERGEANT DAMON MARTIN, ON OR ABOUT JUNE 12, 2018, AT APPROXIMATELY 1110, WHILE ASSIGNED TO INT CIS AND ON DUTY, INSIDE AN APARTMENT IN THE VICINITY OF CRYSTAL STREET, KINGS COUNTY, ABUSED HIS AUTHORITY AS A MEMBER OF THE NEW YORK CITY POLICE DEPARTMENT, IN THAT HE SEARCHED SAID APARTMENT WITHOUT SUFFICIENT LEGAL AUTHORITY.

\*SEE CCRB CLOSING REPORT, ATTACHED HERETO.

ACTION TAKEN: 6 VACATION DAYS

**Disclosure # 10:**

MOS Martin is a named defendant in the civil actions:

- Rodney Watt v. City of NY, Et Al, 12CV0016, filed in the Eastern District of NY.
- Andre Beaton v. City of NY, Et Al, 12CV1303, filed in the Eastern District of NY.
- Fitzgerald Brown v. City of NY, Et Al, 13CV04946, filed in the Eastern District of NY.

**Disclosure # 11:**

THE NYPD ISSUED A MINOR PROCEDURAL VIOLATION AGAINST MOS MARTIN DATED 8/12/19:

1. OTHER DEPT RULES/PROCEDURES VIOLATION

CASE CLOSED: 03/03/2020

**Disclosure # 12:**

In October and November of 2019, JHO Goldberg presided over a *Huntley* hearing for Indictment Number 357/2019. On January 8, 2020, Judge Jane Tully adopted the findings of fact and recommendation that JHO Goldberg issued in his Report dated December 4, 2019. In his Report, which recommended the suppression of the defendant's two statements to law enforcement, JHO Goldberg stated that, "Given [...] Sergeant [Martin's] past history of numerous claims of misconduct being made against him, the sergeant's testimony that he 'assumed' his interactions were being recorded on a body camera, even though he sent the only two officers who were wearing activated body cameras out of the room, is not credible".

**Indictment No. 357/2019 is currently pending.**

JHO Goldberg's Report is attached hereto.

**Disclosure # 13:**

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATIONS AGAINST MOS MARTIN DATED 3/3/20:

1. REPORT INCOMPLETE/INACCURATE - PROPERTY CLERK INVOICE

CLOSED DATE : 2020-03-20

ACTION TAKEN : VERBAL INSTRUCTIONS

**BASED UPON CCRB DOCUMENTS UP TO DATE THROUGH MAY 7, 2021, THE PEOPLE ARE AWARE OF THE FOLLOWING CCRB SUBSTANTIATED AND/OR PENDING ALLEGATIONS AGAINST THIS OFFICER:**

**Disclosure # 14:**

CCRB CASE: 200613930

Report Date: 10/19/2006

Incident Date: 10/18/2006

CCRB SUBSTANTIATED ALLEGATIONS:

1. Abuse - Premises entered and/or searched
2. Abuse - Search (of person) Substantiated (Charges) Not Guilty -

NYPD Disposition: Not guilty on both allegations:

**Disclosure # 15:**

CCRB CASE: 200616696

Report Date: 12/14/2006

Incident Date: 12/14/2006

CCRB SUBSTANTIATED ALLEGATION: Abuse - Question and/or stop  
NYPD Disposition: No Disciplinary Action

**Disclosure # 16:**

CCRB CASE: 200814508

Report Date: 10/07/2008

Incident Date: 10/04/2008

CCRB SUBSTANTIATED ALLEGATIONS:

1. Abuse - Retaliatory arrest
2. Abuse - Stop
3. Abuse - Strip-searched
4. Abuse - Threat of force (verbal or physical)

NYPD Disposition: Guilty on allegations 1 and 3; no disciplinary action on allegations # 2 and # 4.

NYPD Penalty: Forfeiture of 15 vacation days.

**Disclosure # 17:**

CCRB CASE: 201004238

Report Date: 03/30/2010

Incident Date: 03/24/2010

OTHER MISCONDUCT NOTED:

1. OMN - Failure to prepare a memo book entry
2. OMN - Failure to produce stop and frisk report

**Disclosure # 18:**

CCRB CASE: 201804938

Report Date: 06/20/2018

Incident Date: 06/12/2018

CCRB SUBSTANTIATED ALLEGATION: Abuse - Search of Premises

**Disclosure # 19 (PENDING):**

CCRB CASE: 201901320

Report Date: 02/12/2019

Incident Date: 02/07/2019

PENDING CCRB ALLEGATIONS:

1. Force - Physical force
2. Force - Physical force
3. Abuse - Entry of Premises
4. Abuse - Threat of arrest

**Disclosure # 20 (PENDING):**

CCRB CASE: 201910652

Report Date: 12/12/2019

Incident Date: 11/20/2018

PENDING CCRB ALLEGATIONS:

1. Abuse - Entry of Premises
2. Abuse - Refusal to show search warrant
3. Abuse - Search of Premises

Eric Gonzalez  
District Attorney  
Kings County

**INCIDENT DATE: 10/4/2008:**

**Allegation A: Sgt. Martin Stopped [REDACTED]**

According to Terry v. Ohio, 392 U.S.; 20 L. Ed. 2d 889 [1968], a police officer may execute a forcible stop of a particular individual when "he reasonably suspects that such a person is committing, has committed or is about to commit a crime. Reasonable suspicion must be based upon those specific and articulable facts which led to the stop.

Although Sgt. Martin initiated the stop because he allegedly observed [REDACTED] in possession of marijuana, the investigation determined it was unlikely Sgt. Martin made such an observation based on his vantage point. Secondly, none of the officers made any attempts to recover the marijuana at the location of the stop. The investigation thus determined that Sgt. Martin lacked reasonable suspicion to stop [REDACTED].

[REDACTED] Based on the foregoing, it is recommended that Allegation A be closed, substantiated.

**Allegation B: Sgt. Martin Threatened [REDACTED] with the Use of Force (Taser)**

As explained above, the investigation has determined that Sgt. Martin did possess a taser and initiated a spark-test while [REDACTED] was in police custody. The circumstances under which it was used and activated, however, are less clear. **Sgt. Martin was not sure whether he activated the taser, and so he could offer no insight as to why he may have done so.** Being that [REDACTED] was handcuffed and he wasn't being violent or threatening in any way, there was no reason for Sgt. Martin to initiate a spark-test of the taser. Sgt. Martin's actions don't appear to have served any legitimate function other than to intimidate [REDACTED].

[REDACTED] Therefore, it is recommended that Allegation B be closed, substantiated.

**Allegation H: Sgt. Martin Strip-searched [REDACTED]**

It is undisputed that Sgt. Martin strip-searched [REDACTED]

According to Finest message dated 5/13/04 re Strip Searches and Patrol Guide 208-05, a "strip search may only be conducted when the arresting officer reasonably suspects that weapons, contraband or evidence may be concealed upon the person or in the clothing, in such a manner that they have not been discovered by either a frisk/field or other search at a police facility....A strip search will be authorized by a supervisor only when an arresting officer has articulated a reasonable suspicion, beyond probable cause, for the arrest."

Although the arresting officer, [REDACTED] did not recall the incident, Sgt. Martin was the officer who directed the arrest. The investigation has already determined that he did not conduct a field search or search of the surrounding area for the marijuana and he did not have probable cause for the arrest. Inasmuch as these are two requirements to justify a strip search, Sgt. Martin lacked the justification to perform a strip search of [REDACTED]. Therefore, it is recommended that Allegation H be closed, substantiated.

*INCIDENT DATE: 06/12/2018:*

**Allegation (B) Abuse of Authority: Sergeant Damon Martin searched [REDACTED] Crystal Street, Ant. 2 in Brooklyn.**

As seen in the excerpt of [REDACTED] body-worn camera footage, embedded below (Board Review 02), Police Officer [REDACTED] is seen entering the apartment behind Police Officer [REDACTED]. Police Officer [REDACTED] walks towards the rear bedroom and says "221" (which is the New York State Penal Law code for marijuana), and then tells the other officers that he found marijuana in plain view. An officer says the 911 caller was on her way to work and refuses to cooperate. Police Officer [REDACTED] first video ends, and then his second video begins with him walking towards the rear bedroom, where there was a closet with no door. Sergeant Marin asks for a flashlight, and then uses the flashlight to examine the top shelf of this closet. This portion of the incident occurs prior to the search warrant being obtained.

201804938\_20181105\_1128\_DM.mp4

[REDACTED] were both in the living room when this took place, and they were unable to see what Sergeant Martin was doing in the bedroom.

Upon being shown Police Officer [REDACTED] video, Sergeant Martin stated that he believed that he was permitted to visually inspect the top shelf of the closet with a flashlight as long as he did not "go through stuff." Sergeant Martin believed that the top shelf was in plain view because it was "open," and that using a flashlight to illuminate the top shelf is not considered a "search." Sergeant Martin believed that he needed make sure every "plain view" area was inspected prior to calling the Kings County District Attorney's office so the officers could report what they could find in plain view prior to swearing out the search warrant. He did not illuminate the shelf for any other reason.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court of the United States wrote, "the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless comes across an incriminating object." In Brigham City v. Stuart, 547 U.S. 398 (2006), citing Mincey v. Arizona, 437 U.S. 385 (1978), the Supreme Court of the United States wrote, "Warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment" (Board Review 10).

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CCRB Case#201804938

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Sergeant Martin stated that his intent in examining the top shelf of the closet with the assistance of a flashlight was to ascertain the contents of the shelf in order to report to the judge what he and the other officers were able to find in the apartment, in order to then obtain a search warrant. Therefore, by his own admission, Sergeant Martin's examination of the closet was motivated by an intent to search for evidence, which violates the definition and spirit of the plain view doctrine set forth in Coolidge v. New Hampshire, which holds that the plain view doctrine applies when an officer is not searching for evidence but nevertheless observes an incriminating object.

The officers had not yet obtained their search warrant when Sergeant Martin searched the closet, and neither Sergeant Martin nor any other officer interviewed cited any exigency that would have merited a warrantless search of the closet. Numerous police officers were at the scene and watched over Mr. [REDACTED] in the living room, while several other officers and no civilians were in the bedroom with Sergeant Martin. As such, the situation inside Apt. 2 was under the officers' control, and no exigent circumstances existed that merited Sergeant Martin's warrantless search of the closet.

Given the investigation's determination that Sergeant Martin searched the top shelf of Mr. [REDACTED] closet, which was not in plain view, with a flashlight and without a warrant or exigent circumstances, it is recommended that **Allegation B be substantiated.**

SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY: CRIMINAL TERM      PART 22

THE PEOPLE OF THE STATE OF NEW YORK, X  
v. REPORT  
[REDACTED] CPL255.20 (4)

v.

[REDACTED] B [REDACTED]

Defendant.

X

Ind. No. 35/2019

December 4, 2019



On October 23, October 28, November 6, and November 7, 2019 with oral argument on the motion on November 18, 2019, a *Huntley* hearing in this case was held before me following a referral pursuant to CPL 255.20,

#### INTRODUCTION

The *Huntley* hearing concerned two statements by the defendant to the police following the execution of a search warrant. Both statements were recorded on video. The central issue on the motion was an unrecorded, *unMirandized* statement to a police sergeant made by the defendant prior to the first recorded statement and what was said during

this interaction between them. The defense contends that what occurred prior to the first recorded statement, including what the defendant said to the police sergeant and what the sergeant said to him, tainted the voluntariness of the defendant's subsequent statements.

The People failed to provide CPL 710.30 (1)(a) notice of the unrecorded statements to the sergeant and did not object to the defense CPL 710.30 (3) motion to preclude those statements.

The People's direct case was based on the testimony of Police Officers [REDACTED] V [REDACTED] and [REDACTED] A [REDACTED] both of whom were wearing body cameras during the execution of the search warrant, and video recordings of the defendant's two *Mirandized* statements. The defense then called the defendant and his wife, C [REDACTED]. In rebuttal, the People called the sergeant to whom the unrecorded, *unMirandized* statements were made, Sergeant Damon Martin.

For the reasons stated below, the defendant's first recorded statement should be suppressed as being tainted by the previous *unMirandized* custodial interrogation. However, the second *Mirandized* statement was sufficiently attenuated, and the motion to suppress that statement should be denied.

## FINDINGS OF FACT

### The Unrecorded Statements

To best describe the events, they will be discussed in chronological

order rather than in the order they were introduced at the hearing, particularly in view of the need to determine if a prior statement or event influenced the voluntariness of a subsequent statement.

The defendant is 59 years-old and has a prior 1981 conviction for manslaughter as well as another unspecified felony conviction (hearing testimony of [REDACTED] B [REDACTED], hereinafter "B" at 228-229; 261).

At about 3:30 am on January 15, 2019, the defendant was in bed with his wife, C [REDACTED], at [REDACTED] Street in Brooklyn (B: 197). Approximately five to eight Emergency Services Unit (ESU) officers broke down the front door of this one family residence (B:197; hearing testimony of Sergeant Damon Martin, hereinafter "M" at 350). The lights in the house were off. The ESU officers had flashlights attached to their rifles and were wearing helmets and body armor. The defendant and his wife were ordered out of bed and into the adjoining living room where the defendant's elderly mother had been sleeping on a couch (B:198). By 3:39 am the house lights were turned on as depicted in the body camera videos introduced in evidence.

The defendant was wearing only boxer shorts and was handcuffed behind his back. At 3:39 am, body camera video worn by Officer A [REDACTED] (People's Exhibit 2) shows the defendant seated on a bar stool in the living room which was exposed to the open front door that had been knocked off its hinges during the police entry. His wife was

ordered to sit beside him on a second couch in the room (B:198). For some reason, the police turned on the air conditioning (B:200). Perhaps the police were warm, because they had been dressed for the cold January weather and had been assembled outside the premises prior to executing the warrant.

The search warrant team was notified they could enter after ESU secured the premises. Body camera video worn by Officer A [REDACTED] (People's Exhibit 2) shows he entered at approximately 3:39 am. A total of six officers were wearing body cameras, but four of them did not turn them on until between 3:54 am and 4:02 am, which was well after the defendant's unrecorded interaction with Sergeant Martin (Hearing Proceeding at 186).

At approximately 3:40 am, Officer A [REDACTED] went to the basement, possibly at the direction of Sergeant Martin, to bring up the defendant's 20 year-old daughter, who had been sleeping down there. (Ex. 2 at 3:40.50).

Moments before, Police Officer [REDACTED] V [REDACTED] the only other officer who, according to the testimony, was wearing a body camera that was activated, was ordered, again possibly by the sergeant, to go upstairs to determine if the upstairs bathroom would be a safe place to keep one of the family's dogs. (Ex. 2 at 3:40.40).

As a result, Sergeant Martin, who was not wearing a body camera, was left in the living room with the defendant. There were no activated body cameras to record their interaction for about two and a half minutes until Officer A [REDACTED] returned to the living room. When A [REDACTED] and V [REDACTED] left, ESU officers were still present in the living room and were engaged in discussions with the sergeant.

Sergeant Martin radioed Aradolino to return from the basement to administer Miranda warnings to the defendant at 3:42:11(Ex. 2). *This was about 90 seconds after A [REDACTED] left, leaving very little time for all the things the defendant claims to have taken place during that interval.*

Before A [REDACTED] returned at 3:43:20, he finished a conversation in the basement with the defendant's daughter. On his return upstairs, the video shows the defendant seated and the sergeant standing in the same positions in the living room as last seen on the video when A [REDACTED] went downstairs (Ex. 2 from 3:40:52 to 3:43:20).

During this brief period, the defendant testified several things took place, some of which were supported by the testimony of his wife, but most of which were denied by the testimony of the sergeant.

The defendant testified:

- the sergeant showed the defendant the search warrant, but the defendant could not read it without glasses (compare People's Exhibit 1,

video of defendant's statement in 75<sup>th</sup> Precinct where the defendant reads and signs a DNA consent form without glasses at 14:41-14:42);

- someone read the warrant to the defendant;
- the sergeant asked if there were any weapons in the house;
- no *Miranda* rights were read;
- he told the sergeant two guns were under the mattress but those guns were not his;
- the defendant said he did not know who owned those weapons;
- at some point during his interaction with the sergeant, they entered the bedroom alone where the interaction continued for approximately five minutes;
- he told the sergeant he was temporarily staying on the premises and that this was not his permanent address;
- the sergeant said that if the weapons were not his, the weapons belong to everybody else in the house, and they would be arrested;
- he believed this included his wife, mother, and daughter;
- in response, the defendant said, well, then everything is mine;
- the sergeant asked if the defendant ever fired the weapons, and when the defendant said he never did, the sergeant told the defendant to just say he tried it out in the backyard;
- the defendant then said, okay, I fired it a couple of times when I thought I heard a burglar and then I went back to sleep;

-he told the sergeant there were two guns under the mattress;  
-the sergeant picked up the mattress and saw one gun;  
-the defendant said there was a second gun by the headboard;  
-the sergeant took the defendant's wallet from his pants that been hanging by the bed and removed the defendant's wallet to look at the defendant's identificaton;

-the sergeant removed \$1580, which was rent money, from the wallet and said, it's not your money, it's mine (B: 201-207; 226-234).

The defendant's wife, C [REDACTED], was seated on the living room couch next to the defendant. The couch was beside the open bedroom door.

She testified in support of the defendant's version of the events that during this same brief period when Officer A [REDACTED] was gone:

-the sergeant said the warrant was for weapons and drugs;  
-the sergeant asked the defendant where the weapons were;  
-the defendant answered that there was a gun at the foot of the bed and a BB gun by the headboard;

-she saw the sergeant go into the bedroom alone and lift the mattress (hearing testimony of C [REDACTED], hereinafter "C" at 272-273, this conflicts with the defendant's version which did not claim the sergeant first went into the bedroom alone);

-the sergeant came back and asked who the guns belonged to;

-the defendant said he did not live there and did not know who owned the guns;

-the sergeant then escorted the defendant into the bedroom, and the sergeant questioned the defendant about who owned the guns;

-after the defendant said he did not live there, she saw the sergeant retrieve the defendant's wallet from his pants, look at identification, and then take money from the wallet;

-the defendant said it was rent money, and the sergeant replied, "It's not your money anymore."

-the sergeant then took the defendant back into the living room;

-the sergeant told the defendant that he must have fired the gun a couple of time and suggested this was done in the backyard;

-that when the defendant denied the guns were his, the sergeant said, then the guns belong to everybody in the house, I'm going to take them in;

-the defendant said, in response, that the guns were his, just leave my family alone and do not make a mess (C: 273 - 275; 292 -293).

It should be noted that C [REDACTED] also testified that when the defendant was later brought into the bedroom and gave his second statement which was recorded on body camera video, she could not hear what the defendant said other than that the guns were his and again ask the police not to make a mess (C: 279).

Sergeant Damon Martin, a 22-year veteran of the police department assigned to the Criminal Intelligence Section of the 75<sup>th</sup> Precinct, was called to rebut the defense claims regarding his first statement and its influence on the second and third statements.

The sergeant claimed not to know that his initial interaction with the defendant was not recorded on another officer's body camera (M: 301; 389). Thus, when officer A [REDACTED] went downstairs and officer V [REDACTED] went upstairs, he did not know the only two officers with activated body cameras were out of the living room where he remained with the defendant (M: 368-369). Based on his rank and assignment, he was not wearing a body camera (M: 302; 355-356).

Body cameras, of course, are intended, among other things, to capture evidence of police misconduct as well as protect police from unfounded accusations of misconduct. Considering Sergeant Martin's past history of Civilian Complaint Review Board (CCRB) findings of substantiated allegations of misconduct and additional sworn allegations of impropriety in several pending lawsuits, the sergeant should have been careful to insure that his interactions with the defendant were recorded on at least one of the six body cameras being worn by the other officers under his supervision who were on the premises – unless he did not want his interactions with the defendant to be recorded.

The sergeant had four cases with the CCRB between 2006 and 2018 which encompassed seven instances of substantiated abuse of authority involving improper arrests, illegal searches, and illegal strip searches. The 2006 case eventually resulted in the sergeant's exoneration at a departmental trial and the 2018 case is pending a departmental trial. He admitted to no acts of misconduct. (M: 372-378).

In addition, the sergeant was asked about eight other specific instances of misconduct involving illegal arrests, unlawful searches, and unlawful use of force. He claimed not to "recall" these matters which are the subject of pending lawsuits (M: 381-388). Really? All eight?

Given the sergeant's past history of numerous claims of misconduct being made against him, the sergeant's testimony that he "assumed" his interactions were being recorded on a body camera, even though he sent the only two officers who were wearing activated body cameras out the room, is not credible. The People did not call the other four officers whose body cameras were not activated until at least 15 minutes after their entry into the premises to explain why their cameras were turned on so long after A [REDACTED]'s and V [REDACTED]'s cameras. (See Defendant's Exhibit A, officer V [REDACTED]'s body camera at 3:48:58 on which an officer can be heard telling other officers to activate their body cameras to walk around the house and show the scene.)

Adding a further level of suspicion that the sergeant knew his actions were not being recorded, is the fact that he filled out no police reports concerning his interactions with the defendant, made no notes about it, and did not report the defendant's *unMirandized* statements to him to the District Attorney's Office until the day he was called as a witness at this hearing (M: 398).

The sergeant's recollection of his interaction with the defendant was substantially different than what the defense contends. The sergeant testified:

-he told the defendant in answer to the defendant's inquiry that the police were looking for guns and drugs and showed him the warrant;

-the defendant at first said there was nothing there, but then said there was a BB gun and motioned with his head and body towards the bedroom;

-the sergeant told the defendant, "hold on," not wanting the defendant to say any more (M: 306-308).

At this time the sergeant testified he was also involved with ESU in determining the defendant's mother's medical condition, concerns about traffic outside being blocked by the police presence there, and securing barking dogs inside the house (M: 308-309).

The sergeant testified the defendant admitted to only having a BB gun before the *Mirandized* statement (M: 312).

The sergeant denied:

- ever taking the defendant alone into the bedroom (M: 313; 395);
- ever taking anything, including money, from the defendant's pants or wallet prior to the *Mirandized* statement (M: 313; 394).
- ever telling the defendant to just say he fired a few rounds in his backyard (M: 315; 393);
- ever being told by the defendant there was a real gun in the bedroom, or seeing it there by lifting the bed, prior to the *Mirandized* statement (M: 315; 392).
- did not recall asking the defendant if there were any guns or drugs in the house or who the guns belonged to (M: 390-391);
- denied telling the defendant before *Miranda* that if he did not say the guns were his, the whole family would be arrested (M: 392);
- denied that the defendant before *Miranda* said, the guns were his, just don't arrest his family for possessing them (M: 393).

#### **The First Video Statement**

Both the first and second video statements are of assistance in resolving the conflicting versions of the preceding events as well as determining whether improper conduct occurred during the preceding events that affected the admissibility of the video statements.

As shown in Officer A [REDACTED]'s video, Ex. 2, when he came up from the basement, the police were discussing for about five minutes where to put the family's barking family dogs, including a Rottweiler. The defendant's daughter can briefly be seen seated next to the defendant (Ex. 2 at 3:49:35). At this time, she was in handcuffs (Defense Ex. A at 3:50:15). The defendant is then brought into the bedroom accompanied by the sergeant and other officers (Ex. 2 at 3:50).

Just before Officer A [REDACTED] entered the bedroom with the defendant, ESU officers left the bedroom. One of them informed A [REDACTED] that the bedroom was secure and asked if the small dog inside would be a problem (Ex. 2 at 3:49). The presence of ESU officers in the bedroom at this point to make sure it was safe is inconsistent with the defendant and C [REDACTED]'s testimony that the sergeant previously took the defendant inside the bedroom where they were alone to speak with him privately for five minutes, took money from his wallet, and looked under the mattress for guns.

What is revealing about the subsequent recorded conversation is that much of the sergeant's version of the preceding events is corroborated, while much of the defendant's version is not.

Officer A [REDACTED] began by telling the defendant who is seated on the bed, that the police were there with a search warrant. When

Ardolino offered to show him the warrant, the sergeant said that he already had showed it to the defendant (Ex. 2 at 3:50:16).

Officer Ardolino properly read the *Miranda* rights. The defendant stated he understood each one, and agreed to answer questions (Ex. 2 at 3:50:20-3:51:30). When asked if he was willing to answer questions, the defendant first said, "I guess." Officer A [REDACTED] explained that the defendant had to be more definite, one way or the other. At that point the defendant moved his eyes to the side in the direction of where the sergeant was likely standing and then said yes. The defendant contends this sideways glance is evidence of the sergeant's alleged prior improper previous conversation with the defendant which subsequently affected the defendant's decision to speak to the police.

Officer A [REDACTED] began by saying that we have information you have stuff you are not supposed to have. The sergeant interjected saying, remember I told you we're looking for narcotics. The defendant responded saying, all I got is weed. The sergeant said, I told you what we're looking for and *you said all you had is a "bean shooter"* (Ex. 2 at 3:51:16-3:51:49) [the defense contends that the last phrase is "*you said all you had is under the bed.*" Defense post-hearing letter, November 22, 2019 at 4; compare the People's, version with which the Court agrees, in post-hearing letter, November 22, 2019 at Exhibit A].

This distinction is important, because, in the Court's view, it confirms that the defendant did not previously admit to the sergeant that he knew there was a real gun in the house, belying the hearing testimony of the defendant and C. [REDACTED] on this point.

The sergeant then asked, is there a real firearm in here? The defendant answered, "under this mattress". The defendant's statement made no reference to his present claim that the sergeant had already gone into the bedroom and found a real gun hidden under the mattress. (Ex. 2 at 3:51:43-3:52:07). This exchange is also not consistent with the defendant's present claim that he and the sergeant already had a detailed conversation about the real gun previously being fired by the defendant in his backyard. Further, the defendant did not adhere to his purported agreement with the sergeant to say he fired that gun in the backyard. (This backyard event was not mentioned until the defendant's statement the next morning at the 75<sup>th</sup> Precinct.)

If the defendant, as contended, had assured the sergeant that he would admit, at the sergeant's suggestion, that he previously fired the gun in the backyard, there is no explanation for the sergeant not asking the defendant on this video if the defendant had ever fired that gun anywhere. The absence of such a statement on this video supports a conclusion that there was no such suggestion ever made by the sergeant.

Casting further doubt on the defendant's assertions, is the video showing the actual police search under the mattress. It appears the defendant had to explain to the sergeant where to find the gun. This is inconsistent with the defendant's claim that the sergeant already had seen it. The video shows two officers lifting the mattress to find the gun but only after putting on latex gloves before they would even touch the mattress. During this process, the defendant said, "you're gonna find the second gun, why am I gonna lie to you?" (Ex. 2 at 3:54:12-3:54:53). Apparently, the gun was not easy to find. The sergeant then said, "I didn't see anything else in the bed," which indicates this was the first time the sergeant looked there.

Thus, it appears that the sergeant was never in the bedroom alone with the defendant. It, therefore, follows that the sergeant did not remove money from the defendant's wallet as claimed. On the video, the sergeant is heard to say, "the money stays here," as the defendant is getting dressed (Ex. 2 at 4:01:08). Not only does the defendant not respond to this, he later asks, "can't take no money with me?" (Ex. 2 at 4:02:18). These comments, without a complaint by the defendant about a substantial amount of money allegedly taken from his wallet, are inconsistent with the sergeant having previously taken the defendant's money as alleged.

The defendant's wife, as noted above, who claimed to hear from her position in the living room the exchange between the defendant and the sergeant when they were allegedly alone in the bedroom together, testified that while the defendant was in the bedroom giving the video statement, she was only able to hear the defendant say the guns were his and not to make a mess (C: 279). If she heard what she claims she heard when the defendant and the sergeant were allegedly alone in the bedroom, it seems she should have been able to hear much more of what was said during the approximately 15 minutes the defendant was in the bedroom giving a statement and getting dressed.

As to the alleged threat to arrest the defendant's entire family unless the defendant claimed ownership of the guns in the bedroom, after the defendant told the police there was a real gun under the mattress in addition to the BB gun, the sergeant asked if there were any other guns in the house and remarked, "You got a lot of people here." This can be construed as either a threat to arrest the other people if the defendant did not make further admissions or a caution to the defendant that he should tell the police about any other guns for the safety of the people remaining in the home. Whatever the sergeant's meaning, the defendant appeared to understand it (Ex. 2 at 3:52:35).

The sergeant, while the subject of other weapons in the house was being discussed, is heard to interject, "post grandma" (Ex. 2 at 3:53:20).

It is unknown whether this was a reference to arresting the defendant's mother. (Alternatively, it possibly could mean an officer would need to be "posted" to watch the defendant's elderly mother). Almost immediately after this remark, the defendant told the police there were air rifles in the basement (Ex. 2 at 3:53:52).

Based on the evidence adduced at the hearing, it appears the defense claims that Sergeant Martin took the defendant into the bedroom for a private conversation about guns under the mattress and, while there, looked under the mattress, and took money from his wallet are all false. There does not seem to have been nearly enough time between Officer A [REDACTED] leaving and returning with his activated body camera (which was about one minute after the sergeant radioed for him to come up from the basement) for all of the defense allegations to have taken place. Furthermore, as noted above, several events depicted in the video of the *Mirandized* bedroom statement are inconsistent with these events having taken place as alleged by the defendant and his wife.

The defense version, to a great extent was apparently fabricated between the defendant and his wife (perhaps after viewing the body camera videos and learning the original interaction with the sergeant was not on camera). Indeed, the defendant initially maintained, both privately to the sergeant and then on the video, that the only gun in the bedroom was a BB gun. This is consistent with the sergeant's statement

on the video: “*all you said you had was a bean shooter.*” (In fact, in the second video statement, discussed below, the defendant also initially maintained that all he had was a BB gun).

### **The Second Video Statement**

The defendant and his wife were removed from the premises and taken to the 75<sup>th</sup> Precinct. The defendant was placed in a police van at 4:07 am (Defendant’s Exhibit A, body camera video of Officer [REDACTED] V [REDACTED]). The defendant had testified that on the ride to the precinct, with his wife also in handcuffs in the van, one of the officers said that his wife would not be arrested if he told the police what they wanted to hear (B:241). Although this alleged statement would have been of particular interest to his wife, this testimony was not supported by the defendant’s wife who testified that she did not hear any officer, other than the sergeant, say the defendant must take credit for the guns or she would be arrested (C: 284).

The defendant also testified that when being taken from the holding cells to the interrogation room the next morning, Officer Verrone told the defendant to “keep cooperating or else your wife is going to be arrested too.” The defendant said this made him feel that he had to keep to the same story, because his wife was not yet arrested (B: 217). As a matter of fact, not only was his wife actually under arrest that morning, and this was known to the defendant, she was subsequently

arraigned the next day on the same felony complaint as the defendant. What the defendant knew that morning was that his mother and daughter were not arrested, so that threat, if there had been one, had dissipated.

The defendant was brought into the interrogation room at 2:21 pm (People's Exhibit 1 video at 14:21). Just as the video of the defendant's first statement belies many of the claims of police misconduct made by the defendant, this video also demonstrates the falsity of some of those claims.

The defendant was seated, uncuffed, at a table smoking a cigarette. Officer V [REDACTED] entered the room about a minute later and sat in a chair against a wall to the left side of the defendant apparently texting on his cell phone (Ex. 1 at 14:21 - 14:27). He asked no questions at all.

A male in civilian clothes entered, sat directly opposite the defendant at the same table, and introduced himself as Detective M [REDACTED]. He properly advised the defendant of his *Miranda* rights, and the defendant stated he understood and agreed to answer questions (Ex.1 at 14:27-14:28).

Rather than picking up the conversation from where it left off in the defendant's bedroom following the defendant's statements about the guns under the mattress and the rifles in the basement, the defendant initially told Det. M [REDACTED] he did not know why he had been arrested. He said there was nothing illegal in the house. The defendant referred to

C [REDACTED] as his “girlfriend” and “the mother of his child.” Detective M [REDACTED] informed the defendant that she also was under arrest (Ex. 1 at 14:28-14:29).

The defendant at no time during this interview made any reference to the alleged promises to him made in the police van en route to the precinct and on the way to the interview room that if he “told the same story” his wife would not be arrested. Nor, during either video statement, did he make any mention of the money allegedly taken from his wallet.

At the outset of the questioning, the defendant stated that the only thing illegal in the house that he knew about when the police entered was weed. After Detective M [REDACTED] asked if there was anything else, the defendant said a BB gun. (There was certainly no effort here to keep his wife from being arrested, assuming such an offer was ever made to him, because the defendant’s initial statements made no mention of a real gun.) When Detective M [REDACTED] again asked if there was anything else, the defendant said he had a regular gun which he had for 30 years since he came out of jail that he kept for self-defense (Ex. 1 at 14:29-14:30).

When shown a photograph of ammunition that he was told was found in a safe in his bedroom, the defendant denied knowing they were real bullets and thought they were decorations for a belt. The defendant also remarked that he was set up by the police for his murder arrest in

1981 (Ex. 1 at 14:31-14:32). (It seems the defendant had no shortage of excuses. )

The defendant then conceded that he had a real gun which he had for 20 years and was “locked” under his mattress (Ex.1 at 14:33).

Not long after this admission, Sergeant Martin entered the interrogation room and took a seat on a wall opposite the defendant (Ex.1 at 14:33:55). He had been in his office and had not been listening to the conversation from outside the room (M: 422).

The defendant said he never fired that gun. When Detective Morales questioned this assertion, the defendant said he had fired the gun on one occasion about ten months before at night. Some people were in his backyard climbing a fence trying to get into his neighbor’s garage to steal a motorcycle. He fired the gun four times in the air after one of the intruders pointed something at him. He scared them off and then went back to sleep (Ex. 1 at 14:36-14:37). During this admission to Detective M [REDACTED], Sergeant Martin said nothing.

Sergeant Martin later asked the defendant some questions about this incident, with the defendant adding details about the weather, a camera in his backyard, and the cops being all over the place in response to the shooting (Ex.1 at 14:48). If the sergeant had told the defendant to make up this story, it would be absurd for the sergeant to have asked for details from the defendant at this point. Listening to the defendant give

this account, the defendant does not at all appear to be speaking about something that did not happen or something he was told to say.

It seems from this exchange, that Sergeant Martin was interested in obtaining details of this incident from the defendant, because this was an actual incident that involved the defendant in his own backyard and was known to the police and not some fictitious incident that the night before the sergeant suggested be created by the defendant. Otherwise, the sergeant during this video would have been engaged in questioning the defendant about an incident that they both knew had never taken place, some of the details of which had already been given to Detective M [REDACTED] in the sergeant's presence.

What the defendant did at the hearing by asserting that the sergeant had told him on the night of his arrest to make up this backyard shooting incident was an attempt to explain away the existence of an incriminating video statement about the gun he made of his own volition at the precinct in order to justify his need to keep that gun in his house.

#### **CONCLUSIONS OF LAW**

At a *Huntley* hearing, the People bear the burden to prove the voluntariness of a defendant's statements beyond a reasonable doubt. *People v. Guilford*, 21 NY2d 205, 208 (2013), citing *People v. Anderson*, 42 NY2d 35, 38-39 (1977); *People v. Valerius*, 31 NY2d 51,

55 (1972); *People v. Huntley*, 15 NY2d 73, 78 (1965).

In this case, the defendant's first statements to the sergeant, commencing in the living room, were involuntarily made, because the defendant was questioned while "in custody" without waiving his *Miranda* rights as constitutionally required. The defendant was "in custody" because a reasonable person, innocent of any wrongdoing, would not have felt free to leave under the circumstances of this case. *People v. Paulman*, 5 NY3d 122, 129 (2005); *People v. Harris*, 48 NY2d 208 (1979); *People v. Yukl*, 25 NY2d 585 (1969). The defendant was questioned after the police broke into his home pursuant to a "no knock" search warrant at about 3:30 am, rousted from his bed while wearing only boxer shorts in a cold room, handcuffed, and surrounded by over a dozen police officers, several of whom were carrying rifles and wearing body armor. *People v. Perry*, 97 AD3d 447, 448 (2012).

The defendant's unrecorded statements to the sergeant cannot be found to have been spontaneously made, that is, not in response to custodial interrogation or police conduct likely to elicit an incriminating response, because the sergeant's testimony was not sufficiently credible to support such a finding. *People v. Paulman*, 5 NY3d at 129; *People v. Ferro*, 63 NY2d 316, 322 (1984); *Rhode Island v. Innis*, 446 US 291, 301 (1980). The sergeant was aware, contrary to his testimony, that his interaction with the defendant was not recorded on other officers' body

cameras. Also, the sergeant, who had a prior history of substantiated findings of abuse of authority, may have threatened to arrest the defendant's entire family unless the defendant admitted owning guns found in the house pursuant to the search warrant.

What the defendant said to the sergeant was in dispute at the hearing. The testimony of the defendant and his wife, like the sergeant's, was also not entirely credible. The Court, as noted above, did not credit the defendant's testimony that he initially told the sergeant there was a real gun in the house as well as a BB gun under the mattress; that the sergeant told him to say that he had previously fired the gun in his backyard; and that the sergeant entered the bedroom alone with the defendant where he looked under the mattress and took money from the defendant's wallet.

The defendant's initial custodial statement to the sergeant, made without *Miranda* warnings, that there was a BB gun in the bedroom was incriminatory, because it acknowledged his awareness of a BB gun under the same mattress where a real gun was later found. That statement about the BB gun, therefore, would tend to establish the defendant's knowing possession of the real gun, which is the crucial element of the gun possession crime charged in this case.

Within 10 to 15 minutes after making that statement to Sergeant

Martin, the defendant, still in handcuffs, still wearing only boxer shorts, and still in the presence of the heavily armed ESU officers who broke into his house, was taken from the living room to his adjoining bedroom. The defendant was seated on his bed atop the mattress where the BB gun and the real gun were later found, and advised of his *Miranda* rights by Officer A [REDACTED]. Sergeant Martin was standing close by. The defendant, as seen on the video in evidence as Exhibit 2, may even have glanced at Sergeant Martin before agreeing to make a statement.

The defendant, in this statement, initially admitted to only possessing weed and BB gun under the mattress. As the questioning continued, the defendant also admitted to possessing a real gun under the mattress as well as rifles in the basement.

This *Mirandized* statement was part of a “single continuous chain of events” linked to the prior statement about the BB gun without a “definite, pronounced break in the interrogation” so as to allow the defendant to return, in effect, to the status of one who is not under the influence of illegal questioning. *People v. Chapple*, 38 NY2d 112, 115 (1975). Under our State Constitution protecting against compulsory self-incrimination, more than a *Miranda* waiver is required to dissipate the taint of a prior *Miranda* violation. *People v. Bethea*, 67 NY2d 364, 367 (1986).

*People v. Paulman*, 5NY3d 130-131, listed some factors to be

considered in determining whether, under *Chapple*, there is either a “single continuous chain of events” or a “clear pronounced break” between the prior illegally obtained statement and the *Mirandized* statement, including: “the time differential between the *Miranda* violation and the subsequent admission; whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper police questioning; and whether, prior to the *Miranda* violation, the defendant had indicated a willingness to speak to the police. No one factor is determinative and each case must be viewed on its unique facts.” *Paulman* at 130-131.

In this case, the *Paulman* factors clearly weigh in favor of finding an unbroken “continuous chain of events” between the two statements: only 10 to 15 minutes separated the two statements; the sergeant was present at both statements; there was no meaningful change in either the location or the surrounding circumstances of the two statements; and there was no evidence that the defendant was willing to admit anything to the police about the real gun under the mattress before admitting to possessing only a BB gun.

This case is unlike *People v. White*, 10 NY3d 286 (2008) where a

similar break of 10 to 15 minutes was found sufficient to restore the defendant to one not under the influence of a prior *unMirandized* statement, because in *White* the prior statement was not inculpatory. The defendant merely said he “would tell his side of the story” if the police gave him a Pepsi and Newports. In this case, the defendant’s admission of knowing possession of the BB gun under the mattress was inculpatory and supports a finding of knowing possession of the real gun.

In addition, both of the defendant’s statements may have been influenced by the threat claimed by the defendant to have been made by the sergeant to arrest the defendant’s entire family unless the defendant admitted to possessing any guns found in the house. The existence of such a threat is supported by the sergeant’s mention of “grandma” during the *Mirandized* statement, the sergeant’s comment during that statement that the defendant should consider his family, and the defendant seeing his daughter in handcuffs.

While the police may capitalize on a defendant’s reluctance to involve his family in an investigation and tell a defendant that family members “may face criminal charges” if no one takes responsibility for contraband found in an apartment, the police may not do so if the circumstances create a substantial risk that a defendant might falsely incriminate himself. *People v. Cavallaro*, 123 AD3d 1221, 1223 (3d Dept. 2014). See CPL 60.45 (2)(b)(i) which states that a statement to a

law enforcement officer is involuntarily made when obtained by means of a statement of fact that "creates a substantial risk that the defendant might falsely incriminate himself." A threat to arrest the defendant's elderly mother and 20 year-old daughter, both of whom were sleeping elsewhere in the house, would tend to have the prohibited effect.

**Accordingly, under the circumstances of this case, the People did not prove beyond a reasonable doubt that the defendant's statement, as recorded on People's Exhibit 2, was voluntarily made and should be suppressed.**

The defendant's later *Mirandized* statement at the precinct the next afternoon, on the other hand, was preceded by a sufficiently pronounced break from the prior questioning so as to provide assurance that the *Miranda* warnings effectively insured the voluntariness of those statements free from the influence of the prior questioning.

Again considering the factors listed in *Paulman* at 5 NY3d 130-131: the precinct questioning began at approximately 2:28 pm, over 10 hours after the prior questioning ended at 4:00 am.; different police personnel were involved in the precinct questioning (Sergeant Martin did not enter the precinct interrogation room until about six minutes after the precinct interrogation by Detective M [REDACTED] had begun, by which time the defendant had already waived his *Miranda* rights and admitted to knowing about both guns under the mattress); and there was a change

both in the location and nature of the interrogation, particularly the improved circumstances of the defendant's physical comfort at the precinct.

Further, by the time of the precinct questioning, there was no threat, express or implied, that the defendant's entire family would be arrested if the defendant did not admit to ownership of all the guns in the house. The defendant, at this time, was well-aware that his wife had been arrested, yet he made no comment in his precinct statement that his wife should be released after he had admitted to possessing the firearms, thereby indicating that his precinct admission was not influenced by any promise that his wife would be released if he claimed ownership of the guns.

The defendant did not testify at the hearing that he either believed himself "so committed" by his original statements to the sergeant that he felt bound to make another statement after receiving *Miranda* warnings in the bedroom, or "so committed" by his statements in the bedroom that it would have been "futile" to assert his *Miranda* right to remain silent at the precinct. Therefore, the "cat-out-of-the-bag" rationale of *People v. Tanner*, 30 NY2d 102, 106 (1972), is not supported by the evidence in this case. In *Tanner*, the defendant's failure to mention during his *Huntley* hearing testimony "that his prior statement had any effect on his later statement" was a factor in finding the prior statement did not taint

the subsequent statement. *Tanner* at 106.

Indeed, it would have been unconvincing if the defendant had asserted a *Tanner* rationale in his *Huntley* hearing testimony, because the defendant began both his bedroom statement and his precinct statement by claiming he only knew about the BB gun under the mattress. If the defendant felt “so committed” to his bedroom statement about both guns, he would have immediately admitted in his precinct statement to knowledge of the real gun as well as the BB gun.

Finally, the stressful events in the defendant’s home the night before did not result in such physical, cognitive, and emotional depletion that the defendant was not capable, beyond a reasonable doubt, of voluntarily waiving his *Miranda* rights the next afternoon. See, *People v. Guilford*, 21 NY3d 205, 209 (2013).

**Accordingly, the motion to suppress the defendant’s statement, as recorded on People’s Exhibit 1, should be denied.**



JOEL M. GOLDBERG  
Judicial Hearing Officer